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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 771

BRITISH AMERICAN OIL PRODUCING COMPANY,
Petitioner,

vs.

D. M. BUFFINGTON AND C. R. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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D. M. BUFFINGTON AND C. R. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

J. J. Dorr, the owner of an oil and gas lease on a section of undeveloped land in Pecos County, Texas, entered into a letter agreement with D. M. Buffington and C. R. Smith for the drilling of a test well on said lease, wherein he

agreed to pay them $3,000.00 and to transfer to them a one-fourth interest in such lease; the clauses of said agreement directly involved in this suit being as follows:

> *"It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing price.*
>
> "It is further agreed that in the handling of this as a joint venture, that there is to be no expense as overhead charged upon either side."

The test well was drilled, was a commercial producer of oil, and four additional wells were drilled upon the section in question prior to the assignment by Dorr to British-American Oil Producing Company of a one-fourth interest in the lease.

On February 15, 1938, defendant Dorr executed to plaintiffs Buffington and Smith an assignment of an undivided one-fourth interest in the leasehold estate in question. Thereafter Buffington and Smith assigned one-half of their one-fourth interest in said lease to A. J. Gibson and Richard Hamm, who in turn assigned said one-eighth interest to the British-American Oil Producing Company. On or about August 1, 1938, J. J. Dorr assigned his three-fourths interest in said lease to the British-American Oil Producing Company, reserving an oil payment of $154,687.50 and thereafter, the leasehold estate was owned seven-eighths by the British-American Oil Producing Company, and one-eighth by Buffington and Smith. British-American thereupon began to operate the lease.

It was found that the land in question was located in a high pressure gas area which, in the opinion of the geologist of British-American Oil Producing Company made it unsafe and inadvisable to drill thereon with cable tools. He recommended that further drilling be done with rotary equipment. On August 31, 1938, British-American Oil Produc-

ing Company notified Buffington and Smith of their plan to drill the remainder of the wells with rotary and requested them to submit a bid covering the drilling of wells with that type of equipment. On September 1, 1938, Buffington and Smith replied, saying that the agreement did not require the use of rotary equipment. They declined to submit a bid for future work (R. 159). Buffington, at the trial, admitted that one of two recognized methods of determining the prevailing contract price for drilling was through competitive bidding (R. 207). In view of the taking of such positions on the part of Buffington and Smith, British-American made a contract for the drilling of five wells and later contracted for and drilled the other wells drilled by them, keeping Buffington and Smith advised of the progress made. Between September 1, 1938, and the trial of this cause on September 19, 1939, twenty producing wells were drilled upon said land by British-American at the contract price of $2.00 per foot, and it was to recover alleged lost profits on such drilling that this suit was instituted, in the District Court of the United States for the Western District of Texas.

The court propounded certain interrogatories to the jury in the case, in response to which questions the jury found that there was a prevalent general, customary price in the territory in question for the drilling of wells, and that such price was $2.50 per foot. That at such contract price plaintiffs would have made a profit of $1,250.00 per well, or a total of $25,000 on the twenty wells drilled (R. 74-75).

The District Judge regarded the verdict advisory only, but entered judgment in favor of the plaintiffs against the defendants Dorr and British-American Oil Producing Company for $25,000, without prejudice to the right of plaintiffs to assert a claim for damages on any additional wells drilled upon said land. He rendered judgment in favor of British-American Oil Producing Company on its cross-action

against plaintiffs for $25,382.46, being one-eighth of the total sum he found British-American had expended on said lease, and offset one judgment against the other (R. 91-96).

At the same time he filed findings of fact and conclusions of law (R. 76-91). With respect to the contractual provision in question, he concluded that same was sufficiently definite and certain to be enforced. While he found and concluded that a mining partnership existed, he evidently based his judgment on the further finding and conclusion (R. 86) that the provision of the contract sued on is a "*covenant running with the lease, a profit a prendre or equitable servitude which attached to the lease*", binding on British-American Oil Producing Company as an assignee of an interest in the lease. He obviously did not treat the drilling contract as a partnership obligation, since he considered the full amount of the alleged damage as a *personal obligation* of Dorr and British-American Oil Producing Company rather than an obligation of the so-called partnership.

Defendants moved for a directed verdict, but their motions were denied. (R. 358-372). They also moved to set aside the verdict of the jury and to render judgment for defendant, etc. These motions were overruled and the aforementioned judgment was rendered.

On appeal the United States Circuit Court of Appeals for the Fifth Circuit (Justice Hutcheson dissenting) affirmed, on December 19, 1940, the judgment of the trial court in holding that the contractual provision in question was sufficiently definite and certain to be enforced and held that the plaintiffs were not in default except as to the first well, drilled by the defendant, but were ready, able and willing to drill the other nineteen wells, and specifically held that defendant, British-American Oil Producing Company took its assignment subject to the contract and was bound by its terms, but eliminated the damages allowed as lost profits on

the first well drilled by the defendant, in the sum of $1,093.75, and reduced the balance of the recovery in favor of the plaintiffs by one-eighth, on the ground that the plaintiffs would have been liable for their proportionate one-eighth of the drilling costs, thereby diminishing the judgment in favor of the plaintiffs from $25,000.00 to $20,781.25, offsetting the same against the judgment in favor of British-American Oil Producing Company on its cross action for $25,382.46, leaving judgment in favor of British-American Oil Producing Company for $4,601.21 instead of $382.46, and released Dorr from liability.

Defendant, British-American Oil Producing Company, filed a petition for rehearing in the Circuit Court of Appeals on January 8, 1941, which was overruled by said court on the 14th day of January, 1941.

II.

Jurisdiction.

(a) The judgment to be reviewed is dated December 19th, 1940 (R. 403). There was a petition for rehearing, which was filed January 8, 1941, and was overruled January 14th, 1941 (R. 411).

(b) The statutory provision which is believed to sustain the jurisdiction of this Honorable Court is Section 347 of Title 28, subdivision (a) of the United States Code (Judicial Code, Sec. 240).

III.

Questions Presented.

1. Whether or not the provision in the contract giving plaintiffs, Buffington and Smith, "the preference of all future drilling operations, at the prevailing contract price" was sufficiently complete, definite and certain to support

the judgment rendered in the court below. The majority of the court held that it was. The dissenting member of the court held that it was not.

2. Whether the uncertain language of the alleged option contract could be, and was, made certain by proof outside of the contract by a method not pointed out by its terms, especially in view of the undisputed testimony of plaintiff Buffington himself that there were two ways of determining the contract price, one being by favoritism and the other by competitive bidding, and the contract not indicating which method was to be followed. The majority of the court held in the affirmative, over the dissenting opinion of the third member of the court.

3. Whether after the defendant acquired an interest in the lease, which required continuous drilling operations, and tendered the plaintiffs the opportunity to drill all the other wells to be drilled, who rejected the option tendered them, following which the defendant immediately placed itself in a different position by contracting for the drilling of the remainder of the wells, such rejection was an abandonment of their right, or option, if any, to drill all of the remainder of the wells. The majority of the Circuit Court of Appeals held that their rejection of the offer only applied to the first well, since they later offered to do the drilling in accordance with the contract. The dissenting member of the court held that the option was rejected in its entirety.

4. Whether after the plaintiffs were tendered the opportunity to drill all of the wells and defendant British-American entered into a contract for the drilling of the first five wells, thereby placing itself in a different position, the plaintiffs could recover damages on the first five wells drilled by the defendant. The majority of the court held that they could not recover for the drilling of the first well but could

recover damages for not being allowed to drill the second, third, fourth and fifth wells.

5. Whether the prevailing contract price was more than $2.00 per foot, at which price all of the wells were contracted by the defendant. The majority of the court held that it was, in the face of the undisputed testimony that there were two methods of determining the prevailing contract price, one being by favoritism and the other being by competitive bidding. The dissenting member of the court held in the negative.

6. Whether a partner, joint adventurer, or tenant in common could make a profit on the operation of the lease at their joint expense, there being nothing in the contract to show that such was the intention of the parties, as will appear from an examination of the contract, the pertinent part of which is set out hereinabove under the "Summary Statement of the Matter Involved," page 2.

7. Whether the alleged option in question, not having been assumed by defendant British-American, was binding upon it personally. The Trial Court held that it was, which holding was sustained by the majority of the Circuit Court of Appeals.

8. Whether the alleged option in question was either a covenant running with the leases, a profit a prendre, or equitable servitude, and binding, as such, on the interest of the defendant British-American in the lease. The trial court held that it was, which holding was sustained by the majority of the Circuit Court of Appeals.

9. Whether the plaintiffs could sue the defendant, British-American, as a partner and obtain a personal judgment against it for a partnership obligation without an accounting between the parties. The judgment of the trial court and of the Circuit Court of Appeals holds that in effect.

10. Whether it was the duty of the plaintiffs, alone, to make strict proof of their earnings in the drilling of other wells so as to minimize their damages herein. The trial court and the Circuit Court of Appeals, in effect, held that it was not their duty, although all of the facts as to their activities and the amount of profits earned by them in the drilling of other wells was exclusively within their knowledge.

IV.

Reasons Relied On for the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals that the contractual provision upon which plaintiffs predicate their case is not too incomplete, indefinite and uncertain in its terms to support the judgment rendered, is an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions, including those of other Circuit Courts of Appeals. *Emery Bros.* v. *Mutual Benefit Oil Co.*, 175 Pac. 210 (Okla.); *Forester-Davis Motor Co.* v. *Slaterbeck*, 98 Pac. (2d) 17 Okla.; *Wynne et al.* v. *McCarthy et al.*, 97 F. (2d) 964-970; *American Merchant's Marine Insurance Company* v. *Letton*, 9 F. (2d) 799-801; *Jordan et al.* v. *Buick Motor Company et al.*, 75 F. (2d) 447; *Spivey et al.* v. *Saner-Ragley Lbr. Co. et al.*, 284 S. W. 210-214 (Tex. Com. App.); *Radford* v. *McNeny et al.*, 104 S. W. (2d) 472, and *Canady et al.* v. *Martin et al.* (Tex. Com. App.), 98 S. W. (2d) 1009.

B.

In holding that the uncertain language of the alleged option contract could be, and was, made certain by proof outside of the contract *by a method not pointed out by its*

terms, the majority of the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *35 Corpus Juris 1009; Strait* v. *Fay*, 82 N. E. 648 (Illinois); *Gaston* v. *Sigmund*, 29 Md. 334; *Haskell Motor Company* v. *Remington*, 25 S. W. (2d) 913 (Tex. Com. App.); *Texas Employers' Ins. Assn.* v. *Moore*, (Tex. Com. App.) 56 S. W. (2d) 653; *Brooks* v. *Federal Surety Co.*, 24 F. (2d) 884, and *Keating* v. *Michael*, 242 S. W. 563 (Arkansas). It being undisputed, and plaintiff Buffington himself having testified, that there were two ways of determining the contract price, (1) as a matter of favoritism and (2) by competitive bidding, the failure of the contract to point out which method would be followed and how, when and where this prevailing price would be determined, rendered the contract too indefinite to be enforced.

C.

Having held that the plaintiffs rejected the option, if any, because of the requirement for rotary drilling when the defendant tendered them the opportunity to drill all of the wells, following which said defendant immediately entered into a contract for the drilling of five wells and later for the drilling of the rest of the wells, the Circuit Court of Appeals, in holding that the option was separable as to each well and in not holding that since the plaintiffs had refused to drill any of the wells with a rotary machine they lost the option, rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Co.*, 119 U. S. 149; *Volume 10, Texas Jurisprudence*, page 450, Sec. 261, and page 384, Sec. 317; *Hausler* v. *Hardingill Co.* (Tex. Com. App.), 15 S. W. (2d) 548; *South Texas Telephone Co.* v. *Huntington*, 121

S. W. 242; *Webber* v. *Grand Lodge of Ky.*, 169 Fed. 522, 95 C. C. A. 20, paragraphs 7 and 8; *Pollack* v. *Pollack*, 46 S. W. (2d) 292 (Tex. Com. App.); *Universal Life & Accident Co.* v. *Sanders*, 102 S. W. (2d) 405 (Tex. Com. App.); *Moore* v. *Jenkins*, 109 Tex. 401, 211 S. W. 975 (Texas Supreme Court); *Restatement of the Law on Contracts*, page 484, Sec. 323; 13 *Corpus Juris., Title Contracts*, Sec. 538; 6 R. C. L., Sec. 525; *Price* v. *Stonega Coke & Coal Co.*, 26 Fed. Supplement 172; *Kolachny* v. *Galbreath*, 110 Pac. 902; *Willbanks* v. *Shelby et al.* (Tex. Com. App.) 227 S. W. 371, and *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

The majority of the Circuit Court of Appeals held that, although the plaintiffs, when tendered the opportunity to drill all the remainder of the wells on the lease, rejected it, because of the requirement for rotary drilling, not as to the first well only but in its entirety, and at once sued the defendant for the breach of its option contract, they did not, thereby, breach the alleged contract in its entirety, but only as to the first well drilled. This in spite of the fact that, immediately upon being notified of the rejection of the opportunity to drill, defendant placed itself in a different position by immediately contracting for the drilling of the first five wells drilled on the lease, and later followed this by contracts covering the balance of the wells to be drilled. This holding was erroneous because the assignments to the lease contracts required continuous drilling in the development of the property. The dissenting member of said court held to the contrary.

D.

Having held that the plaintiffs refused the option, if any, when defendant tendered them the opportunity to drill all of the wells, following which said defendant immediately entered into a contract for the drilling of five wells, the Cir-

cuit Court of Appeals, in holding that the plaintiffs could recover damages, if any, on the second, third, fourth and fifth wells, rendered an erroneous decision of an important question of local law.

E.

In holding that the prevailing contract price was other than $2.00 per foot, the price at which the wells were contracted by the defendant on the bid of a competent drilling contractor, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law.

F.

In holding that the contract showed on its face that it contemplated that it was intended that plaintiff should make a profit on the operation of the lease, either as partners, joint adventurers, or tenants in common, the Circuit Court of Appeals, over the dissenting opinion of Judge Hutcheson, rendered an erroneous decision of an important question of local law and is in conflict with applicable local and other decisions. *Howard et al.* v. *Stillwell Bierce Mfg. Co.*, 35 L. Ed. 147, 139 U. S. 199; *Shannon* v. *Schaffer Ref. Co.*, 51 F. (2d) 878; *Wichita Falls Electric Co.* v. *Huey*, 246 S. W. 692; *Amarillo Oil Co.* v. *Ranch Creek Oil & Gas Co.*, 271 S. W. 145; *Eureka Producing Co.* v. *Hoyt*, 266 S. W. 203; *Volume* 20 R. C. L., page 877; *Volume 33, Corpus Juris., Joint Adventures*, page 860, Sec. 65; *Volume 47 Corpus Juris.*, page 786, Sec. 230; *Wilson* v. *Hunt*, 270 S. W. 263.

G.

In sustaining the trial court in holding that the alleged option in the contract was personally binding on the defendant, British-American Oil Producing Company, the Circuit Court of Appeals rendered an erroneous decision of an

important question of general law and is in conflict with the applicable decisions of the Texas Courts. *Kynard, et al.*, v. *Tucker,* 171 S. W. 1086; *George* v. *Blumberg, et al.*, 211 S. W. 309; *McNeill* v. *Cage, et al.*, 85 S. W. 57; *Martin* v. *Rutherford et al.*, 153 S. W. 156; *Montgomery et al.* v. *Craeger,* 22 S. W. (2d) 463.

H.

In sustaining and in not overruling the holding of the trial court that the alleged option in question was either a covenant running with the leases, a profit a prendre or equitable servitude which attaches to such leases, and that defendant, British-American Oil Producing Company, was bound by the terms of the same, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Lemar* v. *Garner,* 121 Tex. 502, 50 S. W. (2d) 769; *Gordon* v. *Empire Gas & Fuel Co.*, 63 F. (2d) 487; *Ehlinger et al.* v. *Clark,* 117 Tex. 547, 8 S. W. (2d) 666; *Thuss's Texas Law of Oil & Gas,* page 128; 19 *Corpus Juris.*, page 870; *Mills & Willingham on the Law of Oil & Gas,* page 233; *Emerson et al.* v. *Little Six Oil Co.*, 3 F. (2d) 265; *G. C. & S. F. Ry. Co.* v. *Smith,* 72 Tex. 122, 9 S. W. 865; *Lakewood Heights Co.* v. *McCuistion,* 226 S. W. 1109; *Montgomery et al.* v. *Craeger* (Tex. Civ. App.), 22 S. W. (2d) 463; *Everett Factories & Terminal Corp.* v. *Oldetyme Distillers Corp.*, 15 N. E. (2d) 829, and *Graham* v. *Omar Gasoline Company,* 253 S. W. 896; 12 Tex. Jur., page 51 and 53.

I.

In not overruling the holding of the trial court that the doctrine of profit a prendre applied to the alleged option in question and rendering judgment holding the defendant, British-American, liable thereunder, the Circuit Court of

Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable decisions. 19 *Corpus Juris.*, 870, and *Thuss's Texas Law of Oil & Gas*, page 128.

J.

In sustaining the holding of the trial court that the rights and liability of the parties to this suit, under the lease in question, which was an "unless lease" and not a "drill or pay" type of lease, are to be determined by the law of landlord and tenant, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and other decisions. *Lemar* v. *Garner*, 121 Tex. 502, 50 S. W. (2d) 769; *Gordon* v. *Empire Gas & Fuel Company*, 63 F. (2d) 487; *Ehlinger et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d) 666, and *Mound Valley Vitrified Brick Co.* v. *Mound Valley Gas & Oil Co.*, 258 Fed. 936.

The trial court held, under the authority of *Pierce-Fordyce Oil Association* v. *Woodrum*, 188 S. W. 245 (Tex. Com. App.), that the principles of landlord and tenant applied to an oil and gas lease, although the lease under consideration in the *Woodrum* case was of the old "drill or pay" type, obligating the lessee to begin drilling operations within six months or pay the delay rental provided for in the lease, and the lease in that case, by its express terms, extended to the legal representatives and assigns of the parties.

K.

In holding that the plaintiffs could sue the defendant, British-American, and obtain a personal judgment against it as a partner for a partnership obligation, without an accounting between the parties, the Circuit Court of Appeals rendered an erroneous decision of an important question of local law and is in conflict with the applicable local and

other decisions. *Martin* v. *McBryde*, 21 A. L. R., 12 (On notation page 34); 47 Corpus Juris, page 804; *Crow* v. *Green*, 111 Pa. 637, 5 Atl. 23; *Hardee* v. *Adams Oil Assn.*, 254 S. W. 602 (Tex. Com. App.); *Brodage* v. *Greenwood*, 261 S. W. 453, and *Meriweather* v. *Hardeman*, 51 Tex. 436.

L.

It being the duty of the plaintiffs to minimize their damage and to make strict proof of same, and it appearing that during the period the twenty wells in question were being drilled plaintiffs devoted a part of their time and equipment in the drilling of other wells for which they received compensation, and in view of the further fact that plaintiffs are seeking compensation from the alleged partnership for lost profits, the Circuit Court of Appeals should have sustained the appellant and should have withheld the rendition of any judgment in their favor until they made full disclosure and accounted for the profits derived from other drilling operations carried on by them, which information was entirely within the knowledge of the plaintiffs and not the defendant. *Williston on Contracts*, Volume 3, page 2401; 8 *Ruling Case Law*, page 441; 13 *Texas Jurisprudence*, page 106; *Selma, Rome & Dalton Ry. Co.* v. *United States*, 139 U. S. 560; *United States* v. *D. & R. G. R. Ry. Co.*, 191 U. S. 84; *Barron G. Collier, Inc.*, v. *Peters Bros., Inc.* (Tex. Com. App.), 124 S. W. (2d) 904; *Mount Ida School for Girls, Inc.*, v. *Rood*, 253 Mich. 482, 235 N. W. 227; *Rossman* v. *Blunt*, 104 F. (2d) 877, and *Greenleaf on Evidence*, Sec. 79.

Wherefore, your petitioner prays that a writ of certiorari issue under the Seal of this Court directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals,

Fifth Circuit, had in the case numbered and entitled on its docket, Number 9475, "British-American Oil Producing Company, et al., Appellants, vs. D. M. Buffington, et al., Appellees", to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Fifth Circuit be reversed, with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

Dated February 15, 1941.

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